

FRIDAY

LESSON 9 POST-AWARD NEGOTIATIONS

TOPIC: POST-AWARD NEGOTIATIONS (CHAPTER 9)

OBJECTIVE: Conduct a post award negotiation (termination settlement)

TIME: Friday 8:00 - 8:30 am

METHOD: Lecture

LESSON PLAN

Ref. Steps In Presenting The Topic Instructor Notes

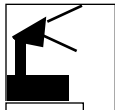
POST AWARD NEGOTIATIONS
(CHAPTER 9)

Primary Learning Objective

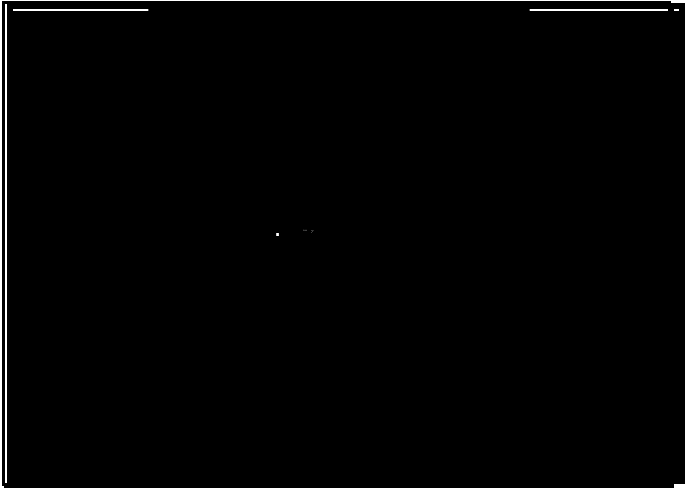
Condition: Given a completed negotiation

Task: Conduct a post award negotiation (termination settlement)

Standard: Understands various types of post award negotiations and their differences in the negotiation environment when compared to preaward, sole source negotiations.



9-1



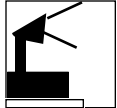
- a. Describe the concept of post award negotiations within the context of contract modifications and termination settlements.

TOPIC: Post-Award Negotiations

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Contract modifications are changes to the terms and conditions of existing contracts. Modifications are often negotiated on contracts that have initially been awarded without negotiation, such as contracts awarded to the lowest bidder.



9-2

Contract Modifications

Negotiate a bilateral supplemental agreement

- Similar to sole source
- Cost analysis is basic for negotiation

Bargaining environment differences :

- Government has fewer alternatives
- Deadlock does not prevent delivery

Text 9.0, p. 128

Termination settlements are negotiations conducted to determine what contractor costs will be reimbursed after a contract has been prematurely concluded.

b. Describe the bargaining environment for contract modifications.

The fact that a modification must be accomplished by the contractor who was awarded the initial contract makes negotiation of bilateral supplemental agreements similar to sole source negotiations.

The basis for the negotiation is cost analysis. The contractor is required to provide certified cost and pricing data when the estimated total cost of the modification is expected to exceed the applicable threshold.

When negotiating supplemental agreements, the government ordinarily has fewer alternatives because only the initial contractor can usually alter the deliverable in ways that were not agreed to in the initial contract. This lack of alternatives gives the contractor more bargaining leverage during the negotiations over the bilateral supplemental agreement. However, a deadlock in negotiations over a bilateral supplemental agreement will not necessarily prevent the government from obtaining the desired work from the

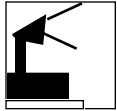
TOPIC: Post-Award Negotiations

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contractor. Because of the Changes Clause in the contract, the government has the option of issuing a unilateral change order to direct implementation of any modification within the scope of that clause.

c. Describe unilateral change orders .



9-3

Unilateral Change Order

- Mutual agreement not necessary
 - One-sided government action
 - Often directed when insufficient time
- Equitable price adjustment
 - Negotiated agreement preferred
 - CO price determination
 - Unilateral decision subject to litigation

Text 9.1, p. 129

A unilateral change order is a one-sided action taken by the government to legally direct the contractor to modify the contract without first obtaining a price for the change. The government can direct a unilateral change when:

- Mutual agreement on the bilateral supplemental agreement cannot be reached and deadlock occurs
- There is insufficient time to negotiate a price for the change before the modification is implemented.

The ability of the government to direct a unilateral change is unique to government contracting. Because of the Changes Clause found in government contracts, the contractor is legally bound to comply with the change order when the work is within the scope of the clause.

d. Describe equitable adjustments.

An equitable price adjustment is legally defined as: The difference between what it would have reasonably cost to perform the work as originally required and what it would reasonably cost to perform the work as changed.

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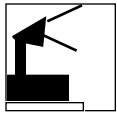
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Equitable price adjustments can result in either increases or decreases in contract price.

The cost of a unilateral change order is determined by an equitable price adjustment. The contracting officer can either obtain mutual agreement with the contractor on the amount of the price adjustment or unilaterally determine the amount. When agreement cannot be reached on the amount of the equitable price adjustment, the contractor has the option of litigating a claim through to the contract review boards or the courts.

e. Discuss the advantages to the government and the contractor of negotiated (as opposed to litigated) settlements.



9-4

Advantages of Negotiated Settlement

- Government benefits:
 - “Burden of proof” avoided
 - Avoid cost risk
- Contractor benefits:
 - Avoids lengthy litigation
 - Avoids significant legal & accounting expenses
 - Avoids legal certification of costs
- Overall benefit: More win/win

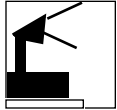
Text 9.1, p. 129-131

TOPIC: Post-Award Negotiations

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Note that negotiated agreements generally tend to be more win/win in orientation compared to the win/lose characteristics of directing a change without first obtaining agreement on price.



9-5

Win/Win Philosophy on Termination Settlements

"A settlement should compensate the contractor fairly for the work done and the preparation made for the terminated portions of the contract, including a reasonable allowance for profit. Fair compensation is a matter of judgment and cannot be measured exactly. In a given case, various methods may be equally appropriate for arriving at fair compensation. The use of business judgment, as distinguished from strict accounting principles, is the heart of a settlement."

(FAR 49.201)

Text 9.2, p. 133

A negotiated agreement on the price for the change is generally a better deal for both sides because it tends to be more win/win in orientation. The government position is often at a significant disadvantage when the equitable price adjustment is appealed to the board of contract appeals or the courts. This disadvantage exists because the government has the legal burden of proof either to prove reductions in costs or to show why increased costs are unreasonable. Because of the difficulty in proving either position, the government can often obtain a better deal in a negotiated settlement. In addition, the government has the opportunity to negotiate fixed price terms for the new work. In litigated adjustments, fixed price contracts are converted to cost reimbursable contracts for the portion of the contract that was modified.

When agreement on price is not obtained, the contractor may be able to claim actual costs that otherwise would not have been realized, including:

- Indirect and direct costs of the additional work that exceed what might have been negotiated
- Legal fees and interest accrued on the claimed amount
- Profit that reflects the actual nature of work as changed.

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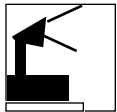
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Besides affecting costs in the changed portion of a contract, the change may also affect the cost of the work under the initial contract that has not changed. For example, there may be disruptions in the flow of work and corresponding reductions in efficiency or learning which could increase costs for the unchanged work.

The contractor can often obtain better deals negotiating a price for the change instead of litigating a price adjustment:

- Appeals to the courts or contract review panels are lengthy processes
- The contractor must often expend significant legal and accounting expenses to be successful
- Appeals to unilateral price adjustments generally require the contractor to legally certify the claim.

f. Define types of termination settlements.



9-6

Termination Settlements

- Two types: "T4C" & "T4D"
- Minimum bargaining pressure on government
- Negotiation environment:
 - Fixed price contracts become cost reimbursable
 - Cost allowability disputes
 - Were costs incurred before or after termination notice?

Text 9.2, p. 132

Termination settlements are post award negotiations to determine contract price when the government unilaterally ceases to continue the terms of the contract.

Contracts terminated for unsatisfactory performance are known as **terminations for default (T4D)**.

Contracts prematurely concluded for the convenience of the government are known as **terminations for convenience (T4C)**.

The focus for this class is T4C.

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g. Discuss the purpose of the termination settlement.

The purpose of a termination settlement is to determine the reimbursement to the contractor for the cost of the work completed up to the time of termination. The intent is to leave the contractor in a position no better or worse than had the contract been completed.

h. Discuss negotiations environment in termination settlements.

Terminations have the effect of changing all contract types to cost reimbursable contracts, therefore, the primary focus of the negotiations is the allowability, allocability, and reasonableness of certain costs. In addition, a major issue in the negotiations is whether the questioned costs were incurred before or after the termination notice.

i. Discuss the government negotiation philosophy as expressed in Part 49 of the FAR.

Although the cost principles are specified in Part 31, terminations are governed by Part 49.

Part 49 of the FAR expresses the philosophy to be used as guidance in determining the termination settlement amount for a fixed price contract:

"A settlement should compensate the contractor fairly for the work done and the preparation made for the terminated portions of the contract...Fair compensation is a matter of judgment and cannot be measured exactly. In a given case, various methods may be equally appropriate for arriving at fair compensation. The use of business judgment, as distinguished from strict accounting principles, is the heart of the settlement."

Part 49 of the FAR states that the cost principals specified in Part 31 are subject to the standard that when fairness clashes with the government official interpretation of costs, fairness should prevail.

Since termination settlements are frequently negotiated for contracts that were initially awarded based on low bid or catalog/market prices, the contractor is often unaware of the

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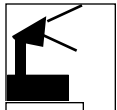
reimbursable cost definitions specified by the FAR. When this occurs, the negotiations form around the costs that the government believes are unallowable, such as interest expense.

In contrast, the contractor often believes that the unallowable costs should be accepted as legitimate business expenses because of normal commercial accounting practices. The fact further strengthens their belief that the contested costs are usually legitimate income tax deductions. Low bid contractors sometimes perceive government unfairness in this regard because they believed at contract award that they would be reimbursed for otherwise reasonable business expenses if the contract was terminated.

Even termination settlements with contractors experienced in negotiating government contracts focus on the allowability of contract costs. However, while these contractors are usually aware of the FAR cost principles, cost validity is often disputed by the issues of reasonableness and allocability. But the major issue in the negotiations frequently is whether the questioned costs were incurred before or after the termination notice.

NOTE that the intent of this FAR citation is a negotiated win/win outcome.

j. Discuss the advantages (to the government) of negotiating a termination settlement.



9-7

Negotiated Termination Agreement Advantages

- **Government benefits**
 - Win/win outcomes more likely
 - Other ongoing contracts and future business
 - Good reputation within industry
 - Avoids burden of proof
- **Contractor benefits**
 - Cash flow problems minimized
 - Avoids lengthy litigation and associated costs
 - Avoids claim certification
 - Maintains good relationship with government

Text 9.2, p. 134

A major advantage to the government during negotiations of a termination settlement is that deadlock does not prevent the government from acquiring a unique deliverable since the contract

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is no longer needed, the acquisition of a deliverable is a moot point. However, the government does not want to worsen an already difficult situation because the contractor has already lost the business associated with the terminated portions of the contract. The government wants to maintain good business relations with the terminated contractor and maintain a good reputation to encourage other companies to bid for government contracts.

When termination settlements are appealed to the courts or contract review boards, the government is at a significant disadvantage. As in the case of contract modifications, the government has the legal burden of proof to show why costs are unreasonable or to prove questioned costs.

k. Discuss the advantages (to the contractor) of a negotiated termination settlement.

The contractor can generally obtain better deals by reaching mutual agreement in a termination settlement instead of deadlocking.

- Appealing to the courts or board of contract appeals will often delay final reimbursement for several years
- Cash flow problems will be further exacerbated by significant legal and accounting expenses needed to pursue a successful appeal
- Contractors can avoid cost certification
- Terminated contractors are often interested in future business with the government and do not wish to harm otherwise good relations by deadlocking.

TOPIC: EXAM
TIME: Friday 8:30 - 9:00 am
METHOD: Individual Exercise

LESSON PLAN

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EXAM (30 MINUTES)



Read these instructions before starting the exam.

1. Print your name in the upper right hand corner of the front page.
2. You have THIRTY MINUTES to complete this examination.
3. Circle the correct response to each multiple choice or true/false question. There is only one correct response to each questions and the correct answer is the one that best answers the question. There is no penalty for wrong answers, so if you are unsure of the correct response, guess at what you feel is the right answer.
4. This is a closed book exam.
5. Except for emergencies, no one will be allowed to leave the classroom until they are finished with the test. Once you finish the exam, bring your test to the front and leave the classroom.

TOPIC: AIRMAC CASE GROUP PREPARATION

OBJECTIVE: Negotiate.

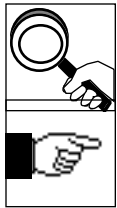
TIME: Friday 9:00 - 10:00 am

METHOD: Small Group Work

LESSON PLAN

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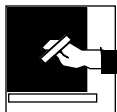
AIRMAC CASE GROUP PREPARATION



- a. **Airmac Case group preparation should proceed in the same manner as Scan and Protecto group preparations.**

Remember:

1. Assign rooms and negotiation times before allowing students to prepare as groups.
2. Assign the classroom to the contractor teams and additional rooms to the government teams.
3. Never assign teams representing different sides to the same room.
4. Write the preparation, negotiation, and critique times on the board. Give a minimum of 3 hours for the negotiation and 1 hour for the critique. **Emphasize the importance of beginning the negotiations on time.**
5. Review student ground rules with particular emphasis on the importance of role playing and the responsibilities of the chief negotiator and observer.
6. Since all negotiations are assumed to occur in the government offices, direct the government teams to report to their assigned rooms a few minutes early to set up the bargaining table.
7. Remind the observer and the team to use Preparation Guide Handout during preparation phase.
8. Release students for the morning break instructing them to report to their assigned rooms at the beginning of the scheduled preparation time.



TOPIC: Airmac Case Group Preparation

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PREPARATION PHASE INSTRUCTOR DUTIES

- a. **Do not** brief the students on the key discussion issues peculiar to the case.
- b. Students should have read the case they will negotiate the night before.



- c. **Spend an equal amount of time observing the individual groups prepare their cases.**

Care should be exercised to ensure that any questions you answer do not give one team an unfair advantage over another, or more information than the other teams have.

TOPIC: AIRMAC NEGOTIATION

OBJECTIVE: Negotiate.

TIME: Friday 10:10 - 2:10 pm

METHOD: Small Group Work

LESSON PLAN

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	<p>AIRMAC NEGOTIATION (3 hours 10 minutes)</p> <p>a. Students generally do not feel they have enough time to fully prepare for the case.</p> <p>However, you should be prepared to end the preparations on time so that the negotiations begin as scheduled.</p> <p>b. Observe as much of the negotiations as possible by watching all three groups.</p> <p>Take notes on both the good things and mistakes that have occurred PAYING PARTICULAR ATTENTION TO THE KEY DISCUSSION ISSUES AND APPLICATION OF PROPER BARGAINING TECHNIQUES, NONVERBALS, AND NEGOTIATION TACTICS for the case that is being negotiated.</p> <p>Observe the bargaining techniques of both sides using Chapter 5 as the standard.</p> <p>Students can often learn from their mistakes. Look for noncompliance with the standard.</p> <p>Be particularly alert for Rule 9 (Say It Right) violations and win/lose negotiation styles. Write down your observations noting the particulars of each situation.</p> <p>c. Even though some students will have questions, you generally should not provide answers during either the bargaining session or the caucus/breaks that ensue.</p> <p>This forces the students to solve problems themselves and ensures the teams with questions are not provided more information than other teams.</p> <p>LET THE STUDENTS MAKE MISTAKES UNLESS THE MISTAKES ARE DETRIMENTAL TO THE LEARNING</p>	

TOPIC: Airmac Negotiation

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PROCESS. The learning experience can often be enhanced by someone's mistakes.

d. Encourage the students to think win/win.

e. Discourage students from finishing early.

f. Ensure that the assigned chief negotiators are doing the talking.

If necessary, remind teams members who speak without specific chief negotiation approval to stay quiet.

g. Give students 1 hour for lunch.

TOPIC: AIRMAC CASE CRITIQUE

OBJECTIVE: Negotiate.

TIME: Friday 2:10 - 3:10 pm

METHOD: Small Group Work

LESSON PLAN

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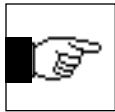
Steps In Presenting The Topic

Instructor Notes

AIRMAC CASE CRITIQUE (1 hour)

- a. **Reassemble the students in the classroom and in a lecture/discussion format review the group negotiations that just took place.**

This review is focused on the key discussion issues for the case and the application of proper bargaining techniques.



- b. **Because some students are sensitive to criticism, you should use care in illustrating inappropriate behavior to ensure that students do not take the criticism as a personal attack.**
- c. **Compare the outcomes of the different teams using the matrix shown below.**

Write the following outcome matrix on the board to compare the results of the different negotiations.

- "A" or "Y" should be indicated under each category if the costs were allowed.
- "D" or "no" should be indicated if the costs are disallowed, while "C" should be shown when there is a compromise on the issue.
- The negotiation with the highest mix of "A's", "D's", and "C's" is often the team with the highest probability of a win/win outcome.

Teams		Outcome Amount	(\$6,238) Interest	Missing Inventory	Freight Charges	Small Tools	Engineering Consultant	Bad Debts	Picnic	Sales Office	Financial Consultant	Profit %
A	B											
F	D											
C	E											

TOPIC: Airmac Critique

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AIRMAC CASE KEY DISCUSSION ISSUES

a. Emphasize the importance of concession making.

The lesson that bargainers have "to give to get" should be emphasized. Bargainers can not "dictate" terms to the other side because concessions are a necessary part of win/win negotiations. In this case, both sides will have to make multiple concessions to reach agreement, but the government side, with has overwhelming power in this case, will be tempted to dictate the terms of the settlement. However, the negotiations will make relatively little progress if the government side uses Part 31 of the FAR and refuses to allow at least some of the questionable costs. Conversely, many bargainers who make wise concessions often obtain more concessions from the other side. Good bargainers will trade little concessions for big concessions.

b. When giving always get something in return.

In this case contractors often concede some obviously unallowable costs , such as interest expense, without obtaining or even requesting another concession in return. This behavior is a violation of "Use Concessions Wisely" and can alter the tone of the entire negotiation. Since the question on the allowability of interest is one of the early negotiation points, and easy concession by the contractor so early in the bargaining session may reinforce the government position that deviations from the FAR are not even negotiable.

c. MAKE POSITIVE ASSUMPTIONS ON YOUR BARGAINING POSITION.

Each side has differing views on what constitutes reasonableness which are both justifiable.

Depending on the circumstances and the assumptions of each party, questioned costs can be justified as either direct or indirect or allowable or unallowable. The consumable hand tools are a good example of this. The contractor charged some of these tools as a direct material expense because they were used solely for the government contract, while charging other consumable tools to the indirect cost pool because they were used for more than one contract. Sales expense is another example where the allowability

TOPIC: Airmac Critique

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depends on the assumptions read into the case. If these costs can be traced to specific contracts, such as a commission for a particular order, they should be charged as a direct cost. On the other hand, if the costs benefit more than one contract or the company as a whole, such as sales office expense, they should be charged as an indirect cost.

d. Do not get stymied on insignificant issues.

This can also be said using the cliché "Do not lose sight of the forest because of the trees". Many negotiations get bogged down on relatively insignificant costs which are almost immaterial to the success of the negotiation. When this happens progress becomes so slow which increases the risk of deadlock or a win/lose outcome.

Agree to disagree and then move on. If these small dollar amount issues cannot be resolved, it is better to pass on these issues or concede the point and establish a conciliatory tone for your side. The employee welfare picnic expense of \$3,500 is an example of a trite issue which frequently stymies the negotiation. Even if the entire amount is conceded, the ultimate settlement is affected by only \$1,800 or half of the \$3,500 because the picnic is an indirect expense which is also shared by Airmac's other business.

TOPIC: Exam Review/Course Critique & Diplomas Issued

OBJECTIVE: Close the course

TIME: Friday 3:10 - 3:30 pm

METHOD: Individual Exercise

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EXAM REVIEW (10 MINUTES)

Review exam by reading the question and stating the correct answer. Do not explain the reasoning for the correct answer unless students have questions or you feel an explanation is appropriate.

COURSE CRITIQUE AND DIPLOMAS ISSUED

TOPIC: **Close**

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